APPENDIX B

DENISE CURTIS-LOCICERO, Plaintiff

SHIN CHONG YONG, Plaintiff

and

GANNETT OUTDOOR CO., INC. OF SOUTHERN CALIFORNIA, LOCAL UNION NUMBER 831, SIGN, SCENE, PICTORIAL PAINTERS, DISPLAY AND DECORATORS I.B.P.A.T. -AFL-CIO, DOES 1-5

Defendants.

No. CV 92-1206 JGD
CV 92-5433 JGD

United States District Court
Central District of California
Filed and Entered June 14 1993

On September 8, 1992, Plaintiff Shin Chong Yong filed a complaint alleging cause of action for (1) age discrimination and (2) ERISA violations. On February 25, 1992 two other Plaintiffs filed a complaints besides Lo-Cicero. The Court concluded plaintiffs did not sustain there burden and defendants were Granted summary judgment. DATED 6/10/93

s/ JOHN G. DAVIES
United States District Judge

Summary Judgment and defendant Local 831's Motion for Summary Judgment came before the Court for argument. The Court has reviewed and considered the parties' papers and the oral arguments of counsel. Based on this review, the COURT HEREBY GRANTS Gannet Outdoor Co.'s motion for summary judgment in its entirely, and GRANTS Local 831's motion for summary judgment in its entirely.

FACTS

On February 25, 1992, plaintiffs Denise Curtis-Locicero, Walter Stewart and Michael Jones filed a complaint against defendants Gannet Outdoor Co., Inc. Of Southern California ("Gannett") and Sign, Scene, Pictorial Painters, Display Decorators, Local Union 831 ("Local 831" or "the Union"), and Does 1-5. Their complaint alleges four causes of action for (1) employment discrimination under 42 U.S.C. § 1981; (2) employment discrimination under Title V11; (3) breach of collective bargaining agreement and unfair representation; and (4) ERISA violations.

On February 22, 1993, pursuant to defendants' motion, the Court dismissed Mr. Jones' action. Mr. Stewart has voluntarily dismissed his claims.

On September 8, 1992, plaintiff Shin Chong Yong filed a complaint against defendants Gannett, Local Union 831, and Does 1-5. His complaint alleges cause of action for (1) age discrimination; and (2) ERISA violations.

Defendant Gannet operates a paint studio for production of handpainted outdoor billboards. Defendant Local 831 is a labor organization that represents employees in this industry.

As the demand for computer generated billboards has increased, the market for handpainted billboards had declined. Between 1989 and 1991, client requests for Gannett's handpainted billboards decreased by almost 30%, whereas the number of Gannett's paint studio employees decreased only minimally by natural attrition. By early 1991, Gannett determined that a layoff of approximately 20% of the existing paint studio workforce was necessary.

In Spring of 1991, during negotiations for a new collective bargaining agreement, Gannett discussed the need for a reduction in workforce with defendant Local 831. After nearly six months of negotiation, Gannett and Local 831 reached a Collective Bargaining Agreement which allowed a one-time layoff of up to ten paint studio employers based on management's evaluation of certain criteria. The criteria for the layoffs were set forth in Addendum A to the Collective Bargaining Agreement, and included (a) comparative skills and artistic ability; (b) seniority; (c) performance; (d) discipline and production capability; and (e) Gannett's needs in particular job classifications. The Collective Bargaining Agreement excluded from the layoff employees with more

than 30 years seniority, as well as employees over the age of 55. The Collective Bargaining Agreement was ratified by the Union membership, and became effective on September 1, 1991. Thereafter, Gannett's Vice President and Operations Manager, William Ripp, its Bulletin Manager, Allen Rossi, and its Paint Studio Supervisor, Toni Lopez, evaluated the company's future needs and determined that it was necessary to lay off seven painters and two helpers. Based on the criteria set forth in Addendum A, Rossi and Lopez separately selected seven artists to be laid off. Denise Curtis-LoCicero ("LoCicero") and Shin Chong Yong ("Shin") were identified on both lists. These recommendations were then discussed and approved by William Ripp and Gannett's President, John Martin. On September 6, 1991, Gannett laid off nine studio employees. Five of the nine, including LoCicero and Shin, subsequently sued both Gannett and the Union, alleging a variety of employment related claims. Denise Curtis-LoCicero had worked for Gannett since November of 1985, when she was hired as an apprentice artist and assigned to the darkroom. After six months, LoCicero was transferred to the paint studio, where she worked as an apprentice artist until approximately June of 1989, when she was promoted ahead of schedule to Journeyman artist. LoCicero alleges that throughout her employment with Gannett, she was subjected to off-color comments of a sexual nature, and other harassing

Conduct. In 1987, LoCicero filed a written complaint regarding the alleged sexual harassment, and Gannett suspended the accused employee, Walter Stewart, as a result. LoCicero never filed other written complaints regarding sexual harassment, but she allegedly complained to Allen Rossi, Gannet's Bulletin Manager, and Toni Lopez, the Paint Studio Supervisor. Rossi allegedly told LoCicero that she needed thicker skin, and thus LoCicero was dissuaded from complaining further. In late 1989, LoCicero requested a promotion from Journeyman to Pictorial Artist. Rossi allegedly promised LoCicero that she would be trained and considered for the promotion, but she never received it. Subsequently, three black men were promoted over LoCicero, through LoCicero claims that her work was superior. In June of 1991, LoCicero inquired again about the promotion, and was allegedly told by Rossi that she would be promoted to Pictorial Artist. On September 6, 1991, LoCicero was laid off without receiving the promotion. On September 12, 1991, LoCicero filed a Charge of Discrimination with the California Department of Fair Employment and Housing, alleging that Gannett discriminated on the basis of sex when it failed to promote her and selected her to be laid off. LoCicero's complaint was forwarded to the EEOC. Additionally, on September 12, 1991, LoCicero filed a grievance with Local 831, claiming that Rossi had promised her a promotion to

Pictorial Artist which she never received. Shin Chong Yong is a 51- years- old male, who was employed with Gannett for 17 years. Shin was one of four artists who worked almost exclusively on outdoor billboards, which are generally exposed to less scrutiny and require less artistic ability and skill than studio work. On January 15, 1986, Shin was warned in writing about the quality and timeliness of his work, but he received no other written warning during his tenure at Gannett. Shin was one of the nine employees laid off on September 6, 1991, Gannett continued to employ two other outdoor artists, both of whom had less seniority than Shin and were under 40 years of age. In February of 1992, during his conversation with another former Gannett employee, Shin considered the possibility that he had been laid off because of his age, in violation of anti-discrimination laws. Thereafter, Shin met with an EEOC representative, who advised him that he did not have a viable claim. Based on the EEOC representative's statement, Shin did not file an EEOC complaint. However, Shin claims that he later sought legal advise and, as a result, filed an "affidavit of complaint" on June 19, 1992. On July 16, 1992, Shin filed a charge of discrimination with the EEOC.

DISCUSSION

A. The Standard

Upon a showing that there is no genuine issue of

material fact as to particular claims, the Court may grant summary judgment in the plaintiff's favor upon all or any part thereof. See W. Schwarzer. A.W. Tashima, J. Wagstaffe, Federal Civil Procedure Before Trial at § 14:33 (citing Fed. R. Civ. Pro. 56 (a) , (b). The standards and procedures are the same as for summary judgment of a claim. Id.

Rule 56 (c) of the Federal Rules of Civil Procedure provides that a court shall grant a motion for summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed, R, Civ. P. Rule 56 (c). Whether a fact is material is determined by looking to the substantive law. Anderson V. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Facts are deemed "material" if a dispute over them "might affect the outcome of the suit under the governing law...." Id. The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. Id. At 256. Rule 56 (e) provides that "(w) hen a motion for summary judgment is made and supported as provided for in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provide in this rule, must set forth specific facts showing that there is a

genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." Fe. R. Civ. P. Rule 56 (e).

As the Supreme Court explained in Matsushita Electrical Industry Co. v. Zenith Radio Corp., 475 U.S. 574 (1986):

> When the moving party has carried its burden under Rule 56 (c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no "genuine issue for trial."477 U.S, at 586-87. A "genuine issue" of material fact exists only when the nonmoving party makes a sufficient showing to establish an essential element to that party's case, and on which that party would bear the burden of proof at trial. Celotex Corporation v. Catrett, 477 U.S. 317, 322-23 (1986). The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. Anderson, 477 U.S. at 255 (citing Adickes v. S.H. Kress and Company 398 U.S. 144 (1970).

However, an alleged "genuine issue" will not defeat summary judgment where the factual context makes the non-movant's allegations implausible. See California Architectural Bldg. Prods., Inc. V. Franciscan Ceramics, Inc., 818 F 2d

1466, 1468 (9th Cir. 1987), cert. denied, 848 U.S. 1006 (1988). Consequently, where the factual context makes the non-movant's claim implausible, the non-movant "must come forward with more persuasive evidence to support their claim than would otherwise be necessary" to show that there is a genuine issue for trial. Id.

B. Analysis

1. Releases Signed By Plaintiffs

According to defendant Gannett, the "core" of plaintiffs' actions are their claims that Gannett should have continued to employ them, and should have laid off someone else. Gannett contends that plaintiffs released any such claims in consideration of a valuable severance package.

At the time of the layoff, both LoCicero and Shin were given a Waiver and Release of Claims Agreement (the "Release"), and were permitted ten days to review it. The Release states:

> I . . . . do waive and relinquish any recall rights or claims I may have to any future employment, in Local 831, with Gannett of Southern California in exchange for severance pay. . . . .

See Rossi Decl., Exs. D & D. In exchange for signing the Releases, LoCicero received $4,880.80, and Shin received $13,913.60. Id. Gannett argues that is entitled to summary judgment based on the signed releases.

The claims raised in the instant action are not exclusively for reinstatement. Gannett offers no authority or argument for the proposition that, by signing the Releases, plaintiffs waived any rights beyond their "recall rights" or claims to future employment. The scope of the Releases raises an issue of fact, and Gannett is not entitle to summary judgment on this ground.

2. ERISA Claims

LoCicero's Fourth Cause of Action' and Shin's Second Cause of Action are bought under the Employee Retirement Income Security Act ("ERISA") § 510, 29 U.S. C. §1140. As employees of Gannett and members of Local 831, plaintiffs LoCicero and Shin participated in the Local 831-Employer Pension

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' LoCicero's Complaint erroneously labels the ERISA claim as the Third Cause of Action Plan. Plaintiffs allege that Gannett excluded employees over the age of 55 from the layoff to protect its own interest in the pension plans, by avoiding liability on the pensions of older employees over the age of 55 from the layoff, and the Unions acquiescence in that exclusion, constitutes a violation of ERISA.

However, neither Gannett nor the Union has any interest in the employee benefit trust fund. "(T)he fiduciary requirements of ERISA specifically insulate the trust from the

employer's interest." N.L.R.B. v. AMAX Coal Co., 453 U.S. 322, 333, 101 S.Ct. 2789, 2796, 69 L. Ed. 2D 672 (1981). The trust funds are legal entities distinct from both the employer who pays the contributions and the Union, which represents the beneficiaries. Id.

Nor did Gannett have any reason to make layoff decisions on the basis of the pension plans. Under the Collective Bargaining Agreement, Gannett made the same contribution for each employee, regardless of seniority or whether the employee was vested. See Collective Bargaining Agreement, Article XIV, Exhibit A to Rossi Decl.

Plaintiffs concede that no genuine issue of fact exists as to the alleged ERISA violation, and that Gannett and the Union are entitled to summary judgment on the ERISA claims.

3. Breach of Collective Bargaining Agreement Under § 301 of the LMRA

LoCicero's Third Cause of Action is for Breach of the Collective Bargaining Agreement and Unfair Representation. This sort of hybrid claim for an employer's breach of collective bargaining agreement and the union's breach of the duty of fair representation arises under § 301 of the Labor-Management Relations Act, 29 U.S. C. § 185 ("LMRA").

LoCicero alleges that, under the earlier April 1, 1988, collective bargaining agreement, she had requested a

promotion and was told she would be considered. Gannett subsequently denied her promotion request. Locicero further alleges that she laid off by Gannett in breach of Article V of the September 1, 1991 Collective Bargaining Agreement. On September 12, 1991, Locicero allegedly requested that a grievance be filed for both the denial of her promotion and her layoff. The Union, allegedly acting in bad faith, grieved only the denial of promotion. On September 16, 1991 Gannett denied Locicero's grievance and, on September 24, 1991, the Union denied prosecution. Locicero alleges that the Union's refusal to prosecute her grievances sanctioned Gannett's conduct, violated Article 21 of the April 1, 1988 collective bargaining agreement, and constituted a breach of the Union's fiduciary duty of representation. An employee is entitled to judicial review of a § 301 breach of contract claim against an employer only if she (1) exhausts the contractual grievance procedures, or (2) proves that the union's breach of its duty of fair representation prevented her from exhausting those procedures. Dutrisac v. Caterpillar Tractor Co., 749 F.2d 1270, 1274 (9th Cir. 1983). Here Locicero never filed a grievance regarding her layoff, and thus she did not exhaust her contractual procedures. See Mitchell Decl., Ex. H.

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2 Plaintiff Shin has not alleged breach of contract or unfair representation claims.

Accordingly, Locicero is entitled to judicial review of her breach of contract claim only if she can establish that the Union breached its duty of fair representation, Dutrisac, 749 F. 2D at 1274. A union breaches its duty of fair representation when its conduct towards a member of the collective bargaining agreement is "arbitrary, discriminatory or in bad faith." Vaca v. Sipes, 386 U.S. 171, 177, 87 S. Ct. 903, 910, 17 L.Ed. 2d 842 (1967). Just as other fiduciaries owe their beneficiaries a duty of care and a duty of loyalty, " a union owes employees a duty to represent them adequately as well as honestly and in good faith." Air Line Pilots Ass'n Intern'l. V. O'Neill, 111 S. Court 1127, 1134 (1991). The doctrine of fair representation exists to ensure that unions serve the interests of all members equally, without hostility or discrimination toward some. Vaca, 386 U.S. at 177, 87 S.Ct. at 910. Locicero claims that the Union breached its duty of fair representation by failing to prosecute two grievances on her behalf, one regarding Gannett's failure to promote her and the second regarding her layoff. Locicero argues that the Unions decision not to prosecute her grievances was at least arbitrary, and possible in bad faith. The doctrine of unfair representation has been narrowly construed where it relates to a union's conduct may not be deemed arbitrary simply because of an error in evaluating the merits of a grievance, in interpreting particular provisions of a collective bargaining

Agreement, or in presenting the grievance at an arbitration hearing." Petersonv. Kennedy, 771 F.2d 1244, 1254 (9th Cir.) cert. denied, 475 U.S. 1122. The union's effectiveness requires that it have discretion to act on behalf of its members, and thus the courts refrain from second-guessing a union's good faith judgments. Id. It is for the union, not the courts, to decide whether and in what manner a particular grievance should be pursued. Id. Thus, the Ninth Circuit has never held that a union acted arbitrarily "where the challenged conduct involved the union's judgment as to how best to handle a grievance." Id. In opposing the present motion, Locicereo simply argues that the question whether the union acted arbitrarily or in bad faith is one of fact. This argument, though accurate, is an inadequate response to the defendants' motion. A question of fact will not preclude summary judgment unless the nonmoving party comes forward with some evidence that a genuine issue exists. With respect to the promotion grievance, Locicero offers no evidence that the Union's refusal to prosecute was arbitrary or in bad faith. Indeed, the evidence reflects the Union's considered judgment of Locicero's grievance. On September 13, 1991, Grant Mitchell, the Union's business manager and chief elected officer, received Locicero's "promotion grievance" and forwarded it to Gannett's legal counsel, Ronald Beals. See Mitchell Decl., para. 11. by letter dated September 6, 1991,

Mr. Beals indicated that the grievance was meritless because the promotion sought was totally within the discretion of Gannett's management, and because it was filed after Locicero had already been laid-off. See Mitchell Decl., Ex. I. By letter dated September 24, 1991, Mitchell advised Locicero that Beal's statement was correct, and that unfortunately the Union would not prevail if it pursued her grievance. Id., Ex. J. Mr. Mitchell provided three reasons for his conclusion: (1) the promotion grievance arose under a collective bargaining agreement which had expired prior to the filing of the grievance; (2) the grievance was filed after Locicero was laid off; and (3) the selection of employees to fill the position sought by Locicero was and had always been the sole prerogative of Gannett's management. Id. Lacking a scintilla of evidence that the Union's decision not to prosecute Locicero's promotion grievance was arbitrary or in bad faith, the Court must defer to the Union's judgment on the merit of the grievance. Locicero further alleges that the Union arbitrarily and in bad faith refused to file or prosecute a grievance regarding her layoff. However, Locicero never filed a written grievance with regard to her lay off, and she admits as much. See Locicero Depo., Exhibit M to Segall Decl. Locicero argues that her failure to pursue a grievance was based on a September 12, 1991 conversation in which Grant Mitchell, the Union's business manager, advised her that a

Layoff grievance would be futile. Id. Mitchell denies participation in any such conversation. See Mitchell Decl., para. 5. Assuming, arguendo, that Mitchell did advise Locicero that a layoff grievance would be futile, such advice would not create a genuine issue as to the Union's arbitrary or bad faith conduct. As discussed earlier, the Union has broad discretion in handling grievances, a process in which the Court should hesitate to interfere. See Peterson, 771 F. 2d at 1254. Locicero offers no evidence to suggest that Mitchell's statement, if he made it, was anything other than a realistic assessment of the merits of Locicero's grievance. As Mitchell knew, the September 1, 1991 Collective Bargaining Agreement provided Gannett with wide discretion to select employees for layoff. Even when all the evidence is construed in favor of Locicero, it is insufficient o raise a genuine issue as to the Unions breach of the duty of fair representation. Locicero has simply failed to offer any evidence that the Union acted arbitrarily or in bad faith, whereas defendants have come forward with persuasive evidence to the contrary. Because Locicero did not exhaust the contractual grievance procedures, and cannot establish a genuine issue as to the Union's breach of its duty of fair representation, her § 301 breach of contract claim is barred. Dutrisac, 749 F.2d at 1274.

Defendants are entitled to summary judgment.

4. Employment discrimination

Shin's First Cause of Action is for Age Discrimination in violation of the Age Discrimination in Employment Act ("ADEA"). Locicero's First Cause of Action is for Sexual Harassment in violation of the Civil Rights Act of 1991. Locicero's Second Cause of Action is for sex discrimination in violation of Title VII.

A. Shin's Age Discrimination Claim

Gannett and Local 831 argue that Shin's age discrimination claim is barred because he failed to file a timely administrative charge. Prior to filling suit under either Title VII or the ADEA, an employee must file a charge of discrimination with the EEOC within 300 days of the alleged discriminatory practice. 42 U.S.C. § 2000e-5 (e); 29 U.S.C. §626 (d). Shin argues that he has met the filing deadline by his June 19, 1993 "affidavit of complaint, " filed 289days after his termination. However, the EEOC has no record of receiving this document. See burris Decl., Exhibit A to Gannett's Reply. It was not produced by Shin during discovery, but appeared for the first time in response to the present summary judgment motion. See Sulzer Decl., para. 2. The only charge of discrimination which appears on the EEOC records was filed on July 16, 1992, 317 days after Shin was terminated. Thus, the administrative charge was not timely filed as required under the ADEA. Alternatively, Shin argues that the filing period is equitably tolled, since he was

Not aware of the possibility that he may have been the victim of age discrimination until several months after his termination

This argument is unpersuasive. The 300-day limitation period of the ADEA may be equitably modified in two circumstances: (1) where the plaintiff is excusably ignorant of the limitations period and there is no prejudice to defendant; and (2) where the plaintiff's failure to file a timely charge is the result of the defendant's misleading conduct. See Naton v. Bank of California, 649 F,. 2D 691, 696 (9th cir. 1981). Shin admits at the time of his termination, he knew Gannett had retained younger outdoor artists. See Shin Depo., at 25 Shin does not contend to have been ignorant of the 300-day limitations period, nor has he raised allegation or evidence of misleading conduct by Gannett. Indeed, Shin apparently retained an attorney prior to the expiration of the 300-day period, an act which has been held to extinguish the equitable reason for tolling the limitations period. See Hay V Wells Cargo, Inc., 596 F. Supp. 635, 640 (D. Nev. 1984; see also Morse v Daily Press, Inc., 826 F,. 2D 1351 (4th Cir.), cert. Denied, 484 U.S. (1987); Edwards v. Kaiser Aluminum & Chemical Sales, Inc., 515 F. 2D 1195 (5th Cir. 1975. Shin asserts that the timeliness of his EEOC charge raises a triable issue of fact, citing Aronsen v. Crown Zellerbach, 662 f.2d 584, 593 (9th Cir.), cert denied, 459 U.S. 1200 (1983) to support his position. However, Aronsen is inapposite, and

Relates only to the existence of a triable issue where an employee does not know the date of his termination. Shin offers no plausible excuse for his delay in filing the EEOC charge. His ineffective attempt to file a complaint on June 19, 1991, if it actually occurred, is insufficient to toll the limitations period. See Hay, 596 F. Sup. At 639 (sporadic and ineffective attempts to pursue age discrimination claim do not equitably toll limitations period). Contrary to Shin's assertion, there is no genuine issue of fact as to when the 300-day period began to run, or as to the timeliness of his EPOCH charge. Gannett and Local 831 are entitled to summary judgment on Shin's age discrimination claim.

B. Locicero's Sex Harassment Claim

Defendants argue that Locicero's sex harassment claim is barred because her EEOC charge failed to assert sexual harassment allegations. Locicero concedes that her EEOC charge did not include a sexual harassment claim, but argues that the EEOC is to blame for this omission. Locicero claims that she advised the EEOC intake counselor that she had been sexually harassed, but was told that the EEOC did not handle such claims against co-workers. See Locicero Decl., para, 6, Accordingly, Locicero abandoned her administrative claim of sexual harassment. Under Title VII, "the scope' of the judicial complaint may not exceed the scope' of the EEOC investigation which can reasonable be expected to grow out of

The charge of discrimination." Sanchez v. Standard Brands, Inc., 431 F.2d 455, 466 (5th cir. 1970; Brown v. Puget Sound Elec. Apprenticeship & Training Trust, 732 F. 2D 726 (9th Cir.) (disparate impact charge filed with EEOC did not encompass claims of intentional sex discrimination), cert. Denied 469 U.S. 1108 (1985). Locicereo's September 12, 1991 EEOC charge states, in relevant part, as follows:

I believe that I was not promoted and that I was laid off because of my sex, female, in violation of Title VII of the Civil Rights Act of 1964, as amended. See Locicero's complaint, Ex. 3. The charge makes no reference to sexual harassment, absent some such allegation, the EEOC could not reasonably be expected to investigate the existence of a "hostile work environment." Locicero essentially admits as much. See Plaintiffs" depo. At 18. The present sexual harassment allegations are not closely related to the prior disparate treatment charge that the EEOC's action on the sexual harassment claims would be redundant. Brown, 732 F 2d at 730. The EEOC did not have an opportunity to consider the sexual harassment claims before the instant lawsuit was filed. " bypassing the administrative process under such circumstances frustrates the policy of encouraging informal conciliation and fostering voluntary compliance with Title VII." Id. The scope of Locicero's EEOC charge is not broad enough to encompass her present sexual harassment claim,

The defendants are entitled to summary judgment on Locicero's First Cause of Action.

c. Locicero's Sex Discrimination Claim

Locicero's Second Cause of Action alleges employment discrimination under a disparate impact theory against defendant Gannett.

3 Locicero's First Cause of Action purports to state a claim against both Gannett and Local 831, although few facts concerning Local 831 are alleged. Locicero never filed an administrative claim alleging any type of discrimination against Local 831, and therefore Local 831 is entitled to summary judgment on the first cause of action.

Locicero claims that Gannett utilized discriminatory selection procedures in making promotion and layoff decisions. Locicero contends that she was not promoted to Pictorial Artist, and was subsequently laid of, because she is a woman. Gannett argues that Locicero has no evidence that it discriminated on the basis of sex in making promotion or layoff decisions, and therefore has failed to raise a genuine issue of fact. Under Title VII, Locicero bears the initial burden of establishing a prima facia case of discrimination by demonstrating that she sought and was qualified for a job which was denied her, but remained available to persons outside the protected class. See McDonnell Douglas Corp. V. Green, 411 U.S. 792, 902, 93 S. Ct. 1817, 1824 (1973. If she

If she is able to do so, the burden of production shifts to Gannett to offer evidence of a legitimate, non-discriminatory basis for its promotion and layoff decisions. Id. If Gannett makes such a showing, Locicero must establish that the proffered neutral basis is merely a pretext for discrimination. Id at 804, 93 S. ct. At 1825. Here, Locicero has established that she sought and was qualified for a promotion to Pictorial Artist. Gannett's Bulletin Manager had made a preliminary determination that Locicero was promotable based upon artistic ability, and had told her so. See Rossi Decl., Ex. N. Locicero was ultimately denied the promotion, whereas three men were promoted. Gannett argues that it has demonstrated a legitimate, non-discriminatory basis for its promotion decisions. Gannett admits that it promoted three male journeyman to Pictorial Artist in 1990, but claims that these promotions occurred before layoffs were contemplated. Once it became apparent that some restructuring of job classifications would be necessary, all proposed promotions were put on hold. See Rossi Decal., Ex. N. No person, male or female, was promoted after Gannett determined to lay off employees. Gannett's failure to promote Locicero on the basis of pending contractual negotiations and potential job restructucturing is legitimate and non-discriminatory.

Locicero disputes the time period during which the three men were promoted, claiming that the promotions occurred in

February of 1991, Locicero contends that this dispute raise a triable issue of fact. However, Gannett has offered deposition testimony evidence that the promotions occurred in 1990, prior to Rossi's preliminary determination that Locicero was qualified to be a Pictorial Artist. See Rossi Decl., Ex. N. Locicero offers no evidence to the contrary. Moreover, Locicero makes no effort to show that Gannett's legitimate explanation for its failure to promote her is merely a pretext. Accordingly, Locicero has not sustained her burden on the claim for discriminatory failure to promote. With regard to her claim for discriminatory layoff, Locicero has established that she was laid off while male Journeyman were retained. But Gannett contends that it had a legitimate, non-discriminatory basis for the layoffs. In making layoff decisions, Gannett had discretion to consider the criteria set forth in Addendum A to the Collective Bargaining Agreement, based on said criteria, Allan Rossi and Toni Lopez created separate list of the nine employees to be laid off. Locicero's name appeared on both lists. Rossi considered Locicero's skill to be less than other artists, and he was aware of complaints that she participated in shouting matches and loud singing at her work station. See Rossi Decl., para. 6. Toni Lopez also considered such complaints of disruptive conduct. See Lopez Decl., para. 3. Of the nine laid off Gannet employees, Locicero was the only women. See Ripp Decl., para. 10. Thus,

Gannett's explanation for the layoff decisions appears to be legitimate and non-discriminatory. Locicero argues that Gannett's explanation is merely a pretext. She submits the declarations of former co-workers David Medore and Walte Stewart, both of whom stated that Locicero was not particularly disruptive and that the paint studio was generally noisy. See Medore Decl., para. 4; Stewart Decl., para. 4. However , Medore and Stewart were not the employees who had previously filed complaints about Locicero's disruptive conduct, See Lopez Decl., para. 3, and their opinions are therefore not particularly probative. Gannetts management was entitled to consider the fact that sone employees found Locicero's behavior distracting. As such, Locicero has failed to come forward with "specific and significantly probative evidence that [Gannetts} alleged purpose is a pretext for discrimination." See Schuler v Chronicle Broadcasting Co., 793 F. 2D 1010 (9th Cir. 1986). Because Locicero has not established that Gannett's facially neutral explanation for its layoff decisions is a pretext for discriminatory conduct, she has not sustained her burden, and Gannett is entitled to summary judgment.

CONCLUSION

For these reasons, the Court HEREBY GRANTS Gannett Outdoor Co.'s motion for summary judgment and Local 831's motion for summary judgment. It is so ordered June 10, 1993. John G. Davies - United States District Judge